



Signed: September 05, 2007

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
QMECT, INC., etc.,
Debtor-in-Possession.

No. 04-41044 T
Chapter 11

In re
FRED AND LINDA KOELLING,
Debtors-in-Possession.

No. 04-46443 T
Chapter 11

QMECT, INC., etc.,
Plaintiff,
vs.

A.P. No. 04-4190 AT
(Consolidated with
A.P. Nos. 04-4365 AT
and 04-4366 AT)

BURLINGAME CAPITAL PARTNERS II,
L.P., etc. et al.,
Defendants.

AND RELATED ADVERSARY PROCEEDINGS

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**MEMORANDUM OF DECISION RE AMENDED MOTION FOR
POST-PETITION ATTORNEYS' FEES AND COSTS**

On May 17, 2007, the Court issued a Memorandum, stating its conclusion that Defendant Burlingame Capital Partners II, L.P. ("Burlingame") may include its contractual post-petition attorneys' fees and costs in its general, unsecured proof of claim against the principals of Qmect, Inc. ("Qmect"): i.e., Debtors Fred and Linda Koelling (the "Koellings"). The Court gave Burlingame 60 days to file a supplemental motion (the "Supplemental Motion"), providing more detail concerning the work done and costs incurred for which it sought payment. The Koellings were given 30 days to file an opposition (the "Opposition"), and Burlingame was given 15 days to file a reply (the "Reply"). Briefing is now complete. Having reviewed the papers filed, the Court finds that Burlingame is entitled to include attorneys' fees and costs in its general, unsecured claim against the Koellings' bankruptcy estate as set forth below.¹

DISCUSSION

A. BURLINGAME'S SUPPLEMENTAL MOTION

Based on In re Fobian, 951 F.2d 1149 (9th Cir. 1991)--the controlling case in the Circuit at that time--the Court previously held that Burlingame could only include in its pre-petition claim its

¹Burlingame is also entitled to include its post-petition attorneys' fees in its unsecured claim against the Qmect bankruptcy estate. However, Burlingame has previously foreclosed on virtually all of the assets in that estate. Consequently, as a practical matter, Burlingame is only asserting its claim for post-petition fees and costs against the Koellings.

1 post-petition fees and costs for work done litigating nonbankruptcy
2 specific issues. Based on this ruling, Burlingame submitted an
3 amended fee application, seeking \$489,154.28 in fees and \$44,524.06
4 in costs. The work done was segregated into the following tasks and
5 the time and fees as to each calculated as follows:

<u>Project</u>	<u>Hours</u>	<u>Fees</u>
Discovery	420.5	\$140,857.50
Motion Practice- Dispositive Motions	613.4	178,512.50
Motion Practice - Other	432.6	150,801.00
Trial Preparation	378.3	117,282.42
Trial and Continued Trial Preparation During Trial	683.4	238,773.48
Post-Trial	74.5	28,077.50
Legal and Fact Research Regarding Claims and Causes of Action	12.0	3,861.00
Total:	2,614.7	\$858,165.40

18 The total was then reduced by 43 percent based on an allocation of
19 the fees incurred between Burlingame and Electrochem Funding LLC
20 ("Funding"), Burlingame's affiliate, based on the relative amounts of
21 their debt.² This resulted in a reduced fee request of \$489,154.28
22 for nonbankruptcy specific work. The request was supported by a
23 brief narrative description of the work performed in each project and
24

25
26 ²The Court previously found that the Funding's claim against
the Koellings had been released.

1 by redacted time sheets. Unredacted time sheets were submitted for
2 in camera review.

3 Before the Court could rule on the reasonableness of these fees
4 and costs, the United States Supreme Court overruled Fobian. In
5 Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric
6 Co., 127 S. Ct. 1199 (2007), the Supreme Court held that, in allowing
7 an unsecured creditor its post-petition fees and costs based on a
8 contractual attorneys' fee clause, there was no basis for
9 distinguishing between work done on bankruptcy specific issues as
10 opposed to nonbankruptcy specific issues. It left open the question
11 of whether an unsecured creditor was entitled to include any post-
12 petition fees or costs in its claim.

13 This issue was then presented to the Court in this case. After
14 briefing and argument, the Court held that an unsecured creditor
15 could include such fees and costs in its claim. As a result,
16 Burlingame filed a supplemental motion (the "Supplemental Motion"),
17 detailing the fees and costs incurred litigating bankruptcy specific
18 issues. In the Supplemental Motion, with respect to such issues,
19 Burlingame seeks \$603,598.79 in fees and \$83,671.42 in costs incurred
20 litigating bankruptcy specific issues. The work done on bankruptcy
21 specific issues is divided into eleven categories with the time spent
22 and fees incurred specified as to each as follows:

<u>Project</u>	<u>Hours</u>	<u>Fees</u>
Motion to Dismiss	200.5	\$ 66,952.00
Miscellaneous Bankruptcy Matters	251.4	90,865.50

1	Valuation	32.2	12,415.00
2	Cash Collateral	510.9	197,959.50
3	Motion for Relief from		
4	Stay/Appointment of		
	a Trustee	542.7	187,356.25
5	Final Motion for Relief		
6	From Stay	973.0	360,179.00
7	Miscellaneous		
	Bankruptcy Research	53.6	23,751.00
8	FRBP 2004 Examination		
9	Motions	51.2	18,800.50
10	Attorneys' Fees	145.4	50,496.50
11	Settlement Discussions	38.0	16,627.50
12	Appeal from Final		
	Relief from Stay		
13	Order	100.0	33,542.50
14	Totals	2,898.9	\$1,058,945.25

15 In the Supplemental Memorandum, the work done in each category is
16 described briefly. As with the work done on nonbankruptcy specific
17 matters, this amount is reduced by 43 percent, resulting in an
18 additional fee request of \$603,598.79. The Supplemental Memorandum
19 is supported by the Declaration of Marlene M. Moffitt (the "Moffitt
20 Declaration"), to which is attached, segregated by category, a line
21 item description of the services provided, the person providing them,
22 the time spent, the hourly rate of the professional performing the
23 service, and the fees incurred. These time sheets are unredacted.

24 In the Supplemental Memorandum, costs are segregated into three
25 categories: (1) \$79,163.32 specially identifiable with bankruptcy
26 related issues, (2) \$41,821.07 not specifically identifiable with

1 bankruptcy related issues from invoices issued by the law firm of
2 Allen Matkins Leck Gamble Mallory & Natsis LLP ("Allen Matkins"), and
3 (3) \$25,807.58 not specifically identifiable with bankruptcy related
4 issues from invoices issued by the law firm of Pachulski Stang Ziehl
5 Young Jones & Weintraub LLP (the "Pachulski Firm") for a total of
6 \$146,791.97. Again, this amount is reduced by 43 percent, resulting
7 in a cost request of \$83,671.42. Further detail is provided with
8 respect to these costs in Exhibits 12, 13, and 14 to the Moffitt
9 Declaration.

10 Burlingame contends that the substantial sums sought are
11 reasonable and were necessary given the "no holds barred" nature of
12 the Debtor's and Creditors' Committee's litigation strategy. It
13 notes that it prevailed on all of the significant issues during the
14 case. In the end, it was granted relief from the automatic stay and
15 foreclosed on virtually all of Qmect's assets.

16 **B. KOELLINGS' OPPOSITION**

17 In their opposition to the Supplemental Motion, the Koellings
18 incorporate by reference their objections to Burlingame's original
19 fee request. There were four categories of fees and costs which they
20 contended were not reasonable: (1) \$72,043.80 in fees incurred in
21 connection with the adversary proceeding initiated by the Official
22 Creditors' Committee (the "Committee"), (2) \$30,401.50 in fees
23 supported only by vague time entries, (3) \$26,219.25 in fees and
24 \$18,900 in costs incurred in connection with Burlingame's failed
25 attempt to call Steven Cowan ("Cowan") as an expert witness, and (4)
26 \$16,642.50 in fees described as "unnecessary." The Koellings also

1 raise three objections to the Supplemental Motion: (5) to the \$66,952
2 in fees and costs incurred prosecuting an unsuccessful motion to
3 dismiss the bankruptcy case, (6) to the \$50,496.50 incurred
4 litigating Burlingame's right to its post-petition fees and costs and
5 (7) to the \$232,631.29 in fees and costs incurred by the Pachulski
6 Firm for which the Pachulski Firm is suing them for payment. Each of
7 these objections is addressed below.

8 **(1) Committee's Adversary Proceeding**

9 Burlingame seeks \$72,043.80 in fees incurred in connection with
10 the adversary proceeding initiated by the Official Creditors'
11 Committee (the "Committee"), challenging the validity of Burlingame's
12 and Funding's security interests under state law.³ The Koellings
13 contend that Burlingame is not entitled to these attorneys' fees
14 because the litigation was with the Committee, not with Qmect.
15 Burlinagme disagrees. It asserts that it is entitled to recover
16 these fees because the Committee undertook that litigation on behalf
17 of Qmect and the estate. The Court agrees with Burlingame. Any
18 other conclusion would permit a chapter 11 debtor to circumvent an
19 attorneys' fees clause permitting the Creditors' Committee to pursue
20 litigation on the contract containing the clause. Thus, the
21 Koellings' objection to these fees will be overruled, and the fees
22 will be allowed.

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³Burlingame concedes that, upon review of its time sheets, it
26 noted one item that should not have been included in the fee
request. Thus, it agrees that its fees in this category should be
reduced \$187.50 to \$71,856.30.

1 **(2) Vague Time Entries**

2 The Koellings object to \$30,401.50 in fees which they contend
3 are supported only by vague time entries. Burlingame disputes that
4 the time entries objected to are vague. It contends that the time
5 entries in question should be read in the context of other time
6 entries. Moreover, Burlingame notes that the Court stated in the
7 Memorandum of Decision, denying its original motion without
8 prejudice, that its fee request need not comply with the rigorous
9 format requirements of the Court's Fee Guidelines for court appointed
10 professionals.

11 The Court has reviewed the time entries objected to by the
12 Koellings as too vague. With only a few exceptions, the Court finds
13 them sufficiently specific to pass muster even under the stringent
14 standards set by the Court's Fee Guidelines. The exceptions are
15 sufficiently clear, in context, to support the Court's finding of
16 reasonableness. This objection by the Koellings will also be
17 overruled, and the fees will be allowed.

18 **(3) Expert Witness Fees**

19 The Koellings object to \$26,219.25 in fees and \$18,900 in costs
20 incurred in connection with Burlingame's failed attempt to call
21 Steven Cowan ("Cowan") as an expert witness.⁴ Burlingame argues that
22 it is entitled to these fees and costs because they were reasonably
23 incurred even though they ultimately did not benefit the litigation.
24

25 ⁴The Koellings filed a motion in limine shortly before trial,
26 seeking to exclude Cowan on the ground that his proposed expert
testimony was inadmissible. The Court granted the motion.

1 In support of this contention, it cites Thayer v. Wells Fargo Bank,
2 92 Cal. App. 4th 819, 839 (2001). It also notes that several of the
3 time entries included in the relevant exhibit do not in fact relate
4 to this task.

5 The Court agrees with the Thayer court that fees and costs
6 should not disallowed simply because, in hindsight, they did not
7 produce results in a case. The test of reasonableness is applied in
8 foresight, not in hindsight. However, the Court concludes that the
9 fees and costs in this category were not reasonably incurred, even as
10 so viewed.

11 The Koellings filed a motion in limine prior to trial to exclude
12 Cowan's testimony. In opposition to the motion, Burlingame indicated
13 that it intended to call Cowan to testify on the meaning of certain
14 contractual documents and on the custom and practice in the lending
15 industry in connection with the types of transactions involved here.
16 The Court found the proposed testimony unnecessary. The Court now
17 finds that the proposed testimony was so clearly unnecessary that
18 incurring these fees and costs was unreasonable. Therefore, this
19 objection will be sustained, and the fees and costs in question will
20 be disallowed.

21 **(4) Unnecessary Fees**

22 Finally, the Koellings argue that \$16,642.50 of the fees sought
23 by Burlingame were unnecessary and should be denied. These fees
24 relate to the testimony of David Ferree ("Ferree"), a vice president
25 of Comerica Bank ("Comerica"). Comerica was the original holder of
26 Qmect's senior secured debt which was acquired by Burlingame shortly

1 before the chapter 11 case was filed and then assigned to Funding.
2 Feree's testimony was offered by Burlingame to establish the basis
3 for Funding's claim and to authenticate documents in Comerica's files
4 relating to Qmect's and the Koellings' banking relationship with
5 Comerica.

6 As the record reflects, Feree had virtually no usefulness as a
7 witness. It was disclosed at trial (and should have been discovered
8 before trial by Burlingame) that Feree became responsible for the
9 Qmect/Koelling account only shortly before the debt was acquired by
10 Burlingame. At trial, therefore, he had virtually no usefulness as
11 a percipient witness. Moreover, as detailed in the Court's
12 memorandum, Feree was unable to authenticate the relevant account
13 records, because he had no knowledge of the manner in which the
14 records were prepared.⁵ Again, this flaw in his capacity to testify
15 should have been discovered by Burlingame prior to trial. The Court
16 concludes that the fees incurred litigating this issue are
17 unreasonable and should be disallowed.

18 **(5) Motion to Dismiss**

19 The Koellings object to the award of \$66,952 in fees incurred in
20 connection with the motion to dismiss the bankruptcy case. The
21 motion was filed shortly after the case was filed. The Koellings
22 contend that it was summarily dismissed. They object to the award of
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25 ⁵In the end, the Court admitted the business records in
26 question under the general rule permitting documents whose
authenticity cannot be reasonably questioned. However, the work
performed by Burlingame, and Ferree's presence as a witness did not
lead to this result.

1 these fees and costs incurred for a matter on which Burlingame failed
2 to prevail.

3 In its reply, Burlingame argues that its fees and costs incurred
4 in connection with its motion to dismiss should not be disallowed
5 simply because the motion was not successful. It notes that a
6 determination of the reasonableness of fees must be based on the
7 totality of circumstances as determined at the time the fees are
8 incurred, not with the benefit of 20/20 hindsight. Fees may be
9 reasonable even if the litigant does not prevail on the particular
10 issue or theory. Moreover, Burlingame asserts, the reasonableness of
11 fees should not be based on the success or failure of "one battle
12 along the road to victory." Burlingame was clearly the prevailing
13 party overall in connection with the bankruptcy case and this
14 adversary proceeding. Thus, Burlingame contends, the Koellings
15 cannot question the reasonableness of any of the fees incurred in
16 connection with a particular motion simply because the motion was
17 unsuccessful.

18 The Court agrees with Burlingame that the reasonableness of fees
19 and costs must be judged based on the totality of circumstances as
20 they appeared when the fees and costs were incurred. It also agrees
21 that fees and costs may have been reasonably incurred even though the
22 motion (or opposition) for which they were incurred was not
23 successful. However, the Court disagrees that the ultimate success
24 of a litigant in a proceeding ensures that all the fees and costs
25 incurred along the way were reasonable.
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1 The Court has reviewed the motion to dismiss and related
2 pleadings and docket entries. Having done so, the Court concludes
3 that the fees were reasonably incurred. Qmect's chapter 11 petition
4 was filed on February 27, 2004. Burlingame's motion to dismiss the
5 case or, in the alternative, for relief from the automatic stay was
6 filed on March 5, 2004, only six days later. Contrary to the
7 Koellings' contention that the motion was summarily denied, the Court
8 held a three day evidentiary hearing on the motion: i.e., on March 26
9 and April 1 and 2, 2004.

10 The motion was based, among other grounds, on the debtor's
11 having improperly handled hazardous waste, having failed to make
12 contributions to employees' 401(k) plans, and having failed to
13 maintain critical insurance. Although the motion was ultimately
14 denied, the continued protection of the automatic stay was
15 conditioned on the appointment of an examiner to ensure Qmect's
16 future compliance with requirements for the handling of its hazardous
17 waste. Under these circumstances, the Court is unable to conclude
18 that it was unreasonable for Burlingame to seek dismissal or stay
19 relief so early in the case. Given the nature of Qmect's opposition
20 to the motion, the fees incurred were also reasonable in amount.

21 **(6) Fees Incurred Litigating Right to Post-Petition Fees**

22 The Koellings contend that Burlingame is requesting that they
23 pay \$50,496.50 in fees and costs incurred litigating its rights to
24 includes post-petition fees and costs in its unsecured claim. The
25 Koellings concede that the United States Supreme Court's ruling on
26 this issue required some of these fees and costs to be incurred.

1 However, they contend that some of the work done by counsel for
2 Burlingame, giving rise to these fees and costs, was necessitated by
3 Burlingame's failure to file a proper fee application in the first
4 place.

5 In its reply, Burlingame argues that it is well established that
6 the fees and costs incurred seeking an award of attorneys' fees and
7 costs are recoverable. It notes that the amount of fees and costs
8 that Burlingame seeks in this category is only \$28,783, not
9 \$50,496.50, after reducing the total incurred by 43 percent. It also
10 notes that this represents only 2.4% of the total fees and costs
11 requested.

12 Burlingame disputes that its original fee application was
13 deficient. It notes that the Court had previously stated that it was
14 not required to comply with the same standards applicable to fee
15 applicants pursuant to 11 U.S.C. § 330. Moreover, it contends that,
16 if it had prepared its original fee application in the format it was
17 ultimately required to utilize, it would have incurred the same
18 amount of fees and costs at that stage of the proceeding.

19 The Court concludes that the Koellings' opposition on this
20 ground is without merit and should be overruled. Most of the fees
21 and costs were reasonably incurred, litigating difficult and novel
22 issues. While the Court found Burlingame's original fee application
23 insufficiently specific, particularly given the amounts in question,
24 the standards for fee applications by counsel not covered by § 330
25 are not clearly defined. Thus, it was not unreasonable for
26

1 Burlingame to have filed a fee application in the first instance
2 lacking sufficient specificity.

3 **(7) Fees and Costs Billed by the Pachulski Firm**

4 The Koellings contend that Burlingame has failed to pay the
5 Pachulski Firm for the work performed in this bankruptcy case.
6 Therefore, Burlingame should not be permitted to include these fees
7 and costs in its unsecured claim. As evidence of Burlingame's
8 failure to pay, the Koellings submit the Declaration of Chris D.
9 Kuhner, to which is attached a copy of a complaint filed by the
10 Pachulski Firm in San Francisco Superior Court, seeking payment of
11 its fees and costs in the amount of \$232,631.29.

12 In its reply, Burlingame notes that, as with other categories of
13 fees and costs, after reducing the total incurred by 43 percent, it
14 is only seeking to recover from the Koellings \$132,600, not \$232,631.
15 Burlingame concedes that it has a fee dispute with the Pachulski
16 Firm. However, it contends that this should not prevent the Court
17 from allowing its request for allowance of the fees as part of its
18 claim. However, Burlingame proposes that this amount be reserved
19 until the fee dispute has been resolved. The Court agrees that this
20 would be appropriate.

21 **CONCLUSION**

22 Burlingame's motion for permission to include its post-petition
23 fees and costs in its unsecured claim against the Koelling estate is
24 granted and Burlingame's objections are overruled except as set forth
25 below:
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1 (1) The Koellings' objection to the fees and costs incurred in
2 connection with Burlingame's failed attempt to call Steven Cowan as
3 an expert witness is sustained, and these fees are disallowed.

4 (2) The Koellings' objection to the fees related to the
5 testimony of David Ferree as unnecessary is sustained, and these fees
6 are disallowed.

7 (3) The issue of whether the fees and costs billed by the
8 Pachulski Firm should be disallowed is reserved for later
9 determination, after Burlingame's dispute with the Pachulski Firm
10 with respect to the fees and costs has been resolved.

11 Burlingame is directed to submit a proposed form of order in
12 accordance with this decision.

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COURT SERVICE LIST

Paul E. Manasian
Manasian & Rougeau, LLP
400 Montgomery St., Ste. 1000
San Francisco, CA 94104

Robert R. Moore
Allen Matkins Leck Gamble & Mallory LLP
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111

Philip J. NicholSEN
Law Offices of Philip J. NicholSEN
221 Main St., #740
San Francisco, CA 94105